

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF VETERANS AFFAIRS

James Lee Ehret,

Petitioner,

Vs

City of Benson,

Respondent.

FINDINGS OF  
CONCLUSIONS OF LAW  
AND RECOMMENDATION

The above-entitled matter came on for hearing before Steve M. Mihalchick, Administrative Law Judge, on November 27, 1990, at 10:00 a.m. in the Commissioner's room, Swift County Courthouse, Benson, Minnesota, pursuant to a Notice of Petition and Order for Hearing issued by the Commissioner of Veterans Affairs on October 3, 1990. Petitioner James L. Ehret, 503 19th Street North, Benson, Minnesota 56215, appeared pro se. Donald A. Wilcox, Benson City Attorney, 1150 Wisconsin Avenue, Benson, Minnesota 56215, appeared on behalf of Respondent City of Benson (City). A post-hearing brief was submitted by the City; no response was submitted by Petitioner. Petitioner did submit a letter after the hearing containing additional evidence. That submission has been excluded from the record as irrelevant and improper testimony. The record was closed on December 17, 1990, the final date allowed for Petitioner to file his reply.

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the Commissioner of Veterans Affairs, 2nd Floor, Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Whether Petitioner was a department head so as to be excluded from the veterans preference protections of Minn. Stat. 197.46.

Based upon the record herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

1. Petitioner is a veteran for the purposes of Minn. Stat. 197.46, having served on active duty in the United States Navy from December 10, 1953 through October 22, 1957, and having received an honorable discharge.

2. Petitioner has worked in electrical maintenance and construction and as a lineman since 1952, before he entered the Navy. According to his DD form 214 (Ex. A), he was an electrician's apprentice in the Navy. Most of his training as a lineman was on the job, although he attended a few short two or three day courses on various aspects of the job.

3. Petitioner started work for the City in December 1975, working as a line foreman. The City owns and operates the electric lines in its jurisdiction and has a backup generating plant. In 1975, the lines and plant were maintained by a department of the City known as the Electric Utility which was headed by a superintendent.

4. In 1977 or 1978, the superintendent of the Electric Utility retired. About the same time, Petitioner left employment with the City and went to work for the REA. However, after twenty-one days, he returned to the City and was hired as the superintendent of the Electric Utility. He remained superintendent of the Electric Utility until 1988, when the City reorganized all of its departments.

5. In 1987, the City had looked at its organization and decided that there were too many departments reporting directly to the City Manager. An ordinance was adopted that organized the City into seven departments under four divisions effective in 1988. Ex. 7. The seven departments are the Water and Waste Water Department (previously two separate departments), the Streets Department, the Parks and Recreation Department, the Electric Service Department, the Municipal Liquor Operations Department, the Police Department and the Billings Office Department. Each of these departments is headed by a "Supervisor," except the Police Department, which is headed by a Police Chief. The Billings Office Supervisor and the Liquor Store Supervisor report

to the Director of Finance, but heads the Division of Finance. The Electric Service Supervisor, Water and Waste Water Supervisor, Streets Supervisor and Park Supervisor report to the Director of Public Works who heads the Division of Public Works. A Division of Engineering was created and is headed by the Director of Engineering, who has no departments under its control. A Director of a Division of Planning and Development position was also created, but has never been filled. All the division directors report to the City Manager. Certain other positions still report directly to the City Manager. These include the Fire Chief, Librarian, HRA Director, Community Education Director and Transit Operator. Ex. 3.

6. Under the reorganization, Petitioner became the Electric Service Supervisor, which was essentially equivalent to his old position as Superintendent of the Electric Utility. He had three employees working underneath him, two linemen and a line foreman or assistant. He reported to the Public Works Director. A new person was brought in and hired as the Public Works Director.

7. In the Administrative Code, Ex. 7, the Electric Service Department is described as follows:

3.350. Electric Service. The Electric Service Department shall be under the direction of the Electric Service Supervisor. This Department shall be responsible for:

- a) The maintenance of the electrical generation facilities.
- b) Maintaining the electric distribution infrastructure of the City.
- c) The maintenance of the head-end where all City electricity is received from the City's transmission agent.
- d) The maintenance and installation of all electric meters.
- e) Construction of new electric lines as required and integration of those lines into the existing electrical distribution infrastructure.
- f) Performing any other related duties as required by the Director of Public Works. (Ordinance 1062.88, 1/7/88).

8. The job description for the Electric Service Supervisor, Ex. 1, states that the position is the head of the Electric Service Department and its primary responsibility is to supervise and administer all of the activities of the Electric Service Department. The Electric Service Supervisor is accountable to the Director of Public Works. The major areas of direct responsibility are described as follows:

- 1. Any full-time employee scheduled to be hired for the electric service department shall be hired by the City Manager upon consultation with the Director of Public Works and the Electric Service Supervisor.
- 2. Electric Service Supervisor shall be responsible for the assignment of work of all employees working within the Electric Service Department.
- 3. Electric Service Supervisor shall be directly responsible for supervising the work of all employees within the Electric Service Department and shall be directly responsible for first line recommendations regarding any suspension, termination or other disciplinary action to be taken in regard to any employee working within the Electric Service Department.
- 4. The Electric Service Supervisor shall have under his direct supervision and management all operations and maintenance of the City's electrical lines, substations and switch gears.



5. The planning, maintenance and operations of all of the City's street lighting system as well as the lighting within all public areas including parks and recreational facilities shall be under the direct management and control of the Electric Service Supervisor.
6. The primary supervision of all employees involved with the electrical generation system shall be under the direct supervision of the Electric Service Supervisor.
7. The maintenance, purchasing, repairing, testing, and evaluating of all electrical metering devices shall be under the direct supervision of the Electric Service Supervisor.

9, Under Section 6.02 of the Benson City Charter, the City Manager is granted the following powers and duties, among others:

Subd. 3. He shall appoint and remove, upon the basis of merit and fitness, all subordinate officers and employees in the departments except the department heads shall be appointed or removed by the city council upon recommendation of the manager. The manager however, may suspend any employee, department head or otherwise for a period of not more than 60 days pending investigation into the affairs of the department or the employee.

Subd. 4. He shall exercise control over all departments and divisions of the city administration created by this charter or by the council.

Ex . 4.

10. The City has no civil service system. There is a labor agreement that covers the employees other than the Department Supervisors, Division Directors, City Manager and Executive Secretary. Section 601 of the City Charter provides procedures for the removal of the City Manager, but all other employees not covered by the labor agreement are considered to be "at will" employees by the City. The City personnel policies provide:

In the case of all exempt employees, it is the policy of the City that a standard employer/employee relationship exists and just as the employee is free to voluntarily terminate their employment for any reason, the employer retains all rights it may have under law to terminate an employee for any reason. The power of termination of all employees with the exception of department supervisors and Division Directors shall rest with the City Manager. In the case of department supervisors and Division Directors, the City Manager may place the employee on suspension but the employee shall have the right to



request a hearing by the Benson City Council. The Benson City Council shall then affirm or deny the termination of these employees.

Ex. 6, page 8. The City personnel policies define department head as a full-time employee as, "a full-time employee that is in charge of a department or a specifically designated function or authority." They define a division director as, "a full-time exempt employee that is in charge of one or more departments or a special group of functions or activities." Ex. 6, Appendix A.

11. The City personnel policies make no provision for the veterans preference rights provided by Minn. Stat. 197.455 regarding hiring or 197.46 regarding removal.

12. In practice, Petitioner was in charge of the day-to-day operation of the Electric Service Department in maintaining the City's electric lines, street lighting and equipment. On occasion, the Public Works Director, and sometimes the City Manager, would be present on the job site and provide some direction or supervision. Both the City Manager and Public Works Director directed Petitioner's activities as Electric Service Supervisor, particularly in creating or coordinating large projects.

13. As Superintendent of the Electric Utility, Petitioner had done more ordering of supplies and materials. When he became Electric Service Supervisor, those responsibilities were reduced to some degree. That change was due at least in part to an interpretation of the City Charter at that time that the City Manager had to exercise greater control over the purchasing function.

14. After the reorganization in 1988, Petitioner spent most of his time with his linemen in the field, working with them and supervising their activities.

15. As Electric Service Supervisor, Petitioner was involved in the hiring of at least one lineman. On that occasion he, along with the Public Works Director and the City Manager, reviewed applications to determine persons to be interviewed, interviewed the selected applicants and chose the person to be hired. In all these activities, the City Manager made the final decision, with the Director of Public Works and Petitioner advising him. Generally, their decisions were by consensus, although, as mentioned, the City Manager was responsible for the final decision both in fact and as required by the City Charter and the personnel policies.

16. In reviewing the performance of the linemen, the City used an Employee Progress Report form. Ex. 2. The linemen were evaluated by the Electric Service Supervisor and that evaluation was then reviewed by the Public Works Director and the City Manager.

17. Division Directors and Department Supervisors were evaluated by a "Base Reviewer" (apparently the Division Director for Department Supervisors) and the City Manager on a Supervisory Appraisal and Development Review form



adopted by the City in 1989. Ex. 5.

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18. In March 1989, Petitioner enrolled in the "Zenger Miller Frontline Leadership" course, a management course provided by the City to Division Directors and Department Supervisors. The program arose out of a desire by the City to stress the management responsibilities of those people and to provide them training in management techniques.

19. On July 16, 1990, the City Council, upon recommendation of the City Manager, took action to terminate Petitioner's employment with the City. He was paid through Saturday, July 21, the end of the pay period. He was notified of the termination by a letter from the City Manager dated July 17, 1990. Ex. B. The letter stated that Petitioner's dismissal was the result of direct council action but that the City Charter implied that Petitioner had a right to a hearing by the council and that if he desired such a hearing he was to contact the City Manager. The letter stated the grounds for the termination as follows:

Your dismissal was based on employee evaluations prepared from 1985 thru 1989. Those evaluations have indicated below standard levels of performance. They have been prepared by four different City employees: Ed Shukle in 1985, Del Preheim in 1986, Ted Loucks in 1988, and myself in 1987 and 1989 as well as a partial in 1986. A general evaluation of your supervisors during the past four months have shown no improvement in your performance.

Ex. B. The letter contained no notice of his right to request a hearing before a Veteran's Review Board within sixty days under Minn. Stat. 197.46.

20. Petitioner requested that he be afforded the rights provided by Minn. Stat. 197.46 in a letter of August 7, 1990, to the City Manager. By letter of August 9, 1990, the City Attorney sent Petitioner a letter stating:

Mr. Klinge has referred your letter of August 7, 1990, to me. I wish to inform you that since you were the head of a department Section 197.46 of Minnesota Statutes does not apply to you and you are not entitled to the hearing you have requested.

Ex. C.

21. On August 8, 1990, Petitioner completed a petition to the Commissioner of Veterans Affairs requesting relief from the City's actions. On October 3, 1990, the Notice of Petition and Order for Hearing was served by mail upon the City and Petitioner setting the hearing in this matter.

22. At the time of his termination, Petitioner was being paid \$15.50 per hour working a regular forty-hour week with little overtime. Since that time he has been seeking employment but has been able to find none due in large part to his age; he is fifty-six. He has been able to do some upholstery work but is making some minimal amount at it. He is drawing unemployment at this time.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

## CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction in this matter pursuant to Minn. Stat. 14.50 and 197.481. The Notice of Hearing issued by the Department of Veterans Affairs was proper and all substantive and procedural requirements of law and rule have been fulfilled.

2. Petitioner is a veteran within the meaning of Minn. Stat. 197.447, and for the purposes of Minn. Stat. 197.46.

3. During his employment with the City since 1988, Petitioner was the Electric Service Supervisor, having control and responsibility over the City's Electric Service Department.

4. During his employment with the City, and particularly at the time of his removal from employment by the City in July 1990, Petitioner was not a department head for the purposes of Minn. Stat. 197.46.

5. Petitioner was removed from his position as Electric Service Supervisor for alleged incompetency.

6. The City did not notify Petitioner of its intent to discharge him or of his right to request a hearing within sixty days of the receipt of a Notice of Intent to Discharge as required by Minn. Stat. 197.46.

7. Petitioner's veterans preference rights provided by Minn. Stat. 197.46 were denied by the City when it discharged him from employment.

8. Petitioner is entitled to reinstatement to his position of Electric Service Supervisor, and to continued employment by the City until he has been afforded all of his rights under Minn. Stat. 197.46.

9. Petitioner is entitled to back pay at the rate of \$620 per week, to the date he is reinstated by the City, less any unemployment benefits received for such weeks, together with interest at the rate of six percent per year from the date such payments should have been made to the date of payment.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

## RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs order that:

1. The City reinstate Petitioner as Electric Service Supervisor immediately with all pay and benefits he would have received had he not been

discharged effective July 20, 1990.

2. The City pay Petitioner back pay in the amount of \$620 per week, from July 20, 1990, to the date of reinstatement, less any unemployment benefits received by Petitioner for such weeks together with interest at the

rate of six percent per year from the date such payments normally would have been made to the date of payment.

3. The City comply with the requirements of Minn. Stat. 197.46 if it intends to discharge Petitioner.

Dated this 21st day of December, 1990.

STEVE M. MIHALCHICK  
Administrative Law Judge

#### NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped, not transcribed.  
Tape No. 9742

#### MEMORANDUM

The Veterans Preference Act provides that honorably discharged veterans may not be removed from employment with a political subdivision without first having the benefit of a hearing. Minn. Stat. 197.46. The statute is expressly inapplicable to the chief deputy of an elected official or a department head. This exemption has been construed to include the head of a department as well as his or her chief deputy. The burden to establish that a veteran is the head of a department is on the political subdivision. *Holmes v., Wabasha-County*, 402 N.W.2d 643 (Minn. App. 1987).

The "head of a department" means the head of some government division "which was important enough to have a deputy," and "only such departments [can] be excluded as a separate department." *State ex rel. Sprague v. Heise*, 243 Minn. 367, 373, 67 N.W.2d 907, 912 (1954).

The Minnesota Supreme Court has itemized the various factors used in several cases to determine whether certain veterans were department heads:

1. Does the alleged department head have charge of the work done by his department?
2. Does his work require technical, professional training?

3. Is he the highest authority at that level of government as to his official duties?

4. Does he supervise all of the work in his department?
5. Does the success of his department depend on his techniques?
6. Are the employees in the department under his direction?
7. Are his duties more than merely different from other employees?
8. Does he have the power to hire and fire subordinates?

State Ex Rel. McGinnis v. Police Civil Service Commission of Golden Valley,  
253 Minn. 62, 75, 91 N.W.2d 154, 163 (1958).

Petitioner was the Electric Service Supervisor of the Electric Service Department. But that department was not "important enough to have a deputy." Petitioner supervised three linemen. One of those linemen was labeled an assistant, but as far as the record shows, performed no assistant functions and certainly no chief deputy functions. Thus, under the Sprague standard, the Electric Service Department cannot be considered a separate department for purposes of Minn. Stat. 197.46.

Examination of the McGinnis factors supports that conclusion. Petitioner was responsible for the work done in the Electric Service Department, but he was subject to the control of the Public Works Director and the City Manager. Petitioner had day-to-day control over the work that was done by the linemen and in fact did that work himself, but everything he did was subject to the control of the Public Works Director and the City Manager. Ultimately, the City Council was responsible for the work done by the Electric Service Department, but Petitioner's position was not so important that he ever met with the City Council, his contacts were strictly with the Public Works Director and the City Manager. Petitioner's title of "supervisor" accurately describes his job; "department head" or "chief deputy department head" do not.

Petitioner's work did require some technical training and, as a supervisor, some supervisory or management training. But there is no indication that the position required any more training than that that Petitioner himself received on the job and in a few short training sessions as an electrician or lineman.

Petitioner was not the highest authority as to his official duties. The Public Works Director and City Manager both had full control and authority over him and the Electric Service Department.

Petitioner did supervise all the work done in the Electric Service Department. The employees there were under his direction.

The success of the Electric Service Department did depend upon Petitioner's technique because he was in charge of the operation. However, there was nothing unusual or innovative about the techniques required in the position. The job basically requires a lineman who can work as a lineman and supervise other linemen. For the same reasons, it must be concluded that Petitioner's duties were not more than merely different from other employees.



He was a supervisory employee and not a "department head" with significant

independence of functioning and ultimate responsibility for major functions.

Petitioner did not have the power to hire or fire employees. That power was held by the City Manager. Petitioner's advisory role in the hiring process does not change that conclusion. Nor did the fact that Petitioner evaluated his employees. That is just a normal supervisory function.

Finally, Petitioner did not occupy a confidential position of trust that makes at-will discharge appropriate and of the type intended to be exempt from the Veterans Preference Act requirement that cause be proved for removal. *Gorecki v. Ramsey County*, 437 N.W.2d 646 (Minn. 1989). Petitioner was merely a supervisor, and one of the lowest level supervisors in the City at that. The City has designed its personnel policies to limit the rights of its employees to the extent possible. It has defined every employee with any sort of supervisory duties as "exempt" and "at will", It has made no provisions in its personnel policies for the veterans preference rights provided by statute in hiring or in firing. It has called even the lowest level functions "departments" and now uses those titles to claim that no veterans preference rights exist. But those rights exist under the statutes and must be granted by the City. *Hall v. City of Champlin*, N.W.2d (Minn. December 7, 1990) (copy attached). If the City desires to discharge Petitioner it must do so in accordance with Minn. Stat. 197.46.

The determination of damages in veteran's preference cases was recently discussed in *Pawelk v. Camden Township*, 415 N.W.2d 47 (Minn. App. 1987). There, the court stated:

Under the Veterans Preference Act, a veteran is entitled to compensation until he is formally discharged in accordance with Minn. Stat. 197.46 (1982). *Henry y, Metropolitan WAste Control Commission*, 401 N.W.2d 401, 406 (Minn. Ct. App. 1987) (citing *Johnson [v. Village of Cohasset]*, 263 Minn. at 437, 116 N.W.2d at 700). The veteran is also entitled to "interest calculated from the time each paycheck was due." *Henry*, 401 N.W.2d at 407. this sum is to be reduced by the amount that the veteran did earn, or with due diligence could have earned, in similar employment. *Id.* (citing *apurck v. Civil\_Service Board*, 231 Minn. 183, 194, 42 N.W.2d 720, 727 (1950)). *Pawelk's* unemployment compensation must be subtracted from his back wages. See *Robertson v, Special School District, No.-1*, 347 N.W.2d 265 (Minn. 1984) (public employer entitled to offset amount of unemployment received against back pay due to discharged employee covered by Veterans Preference Act).

Those standards have been applied in determining the damages here.

SMM